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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 715

THE ARKANSAS CORPORATION COMMISSION AND FIFTY-ONE COUNTY TAX COLLECTORS OF ARKANSAS ..... Petitioners

Vs.

GUY A. THOMPSON, AS TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR ..... Respondent

BRIEF OF THE PETITIONERS

JACK HOLT,
Attorney General.

LEFFEL GENTY,
Assistant Attorney General.

JOSEPH M. HILL,

HENRY L. FITZHUGH,
Counsel for Petitioners.

Conway Pte. Co.

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Counsel for Petitioners.

Statement

The Missouri Pacific Railroad Company is in bankruptcy in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, at St. Louis, in a corporate Reorganization Proceeding under Section 77 of the Bankruptcy Act. The Trustee, under orders of Court, operates the railroad in fifty-one (51) Counties in Arkansas.

On April 11, 1940, the Trustee filed in said District Court a Petition Relative to the Taxes for 1939, Assessed against property of the Trustee in Arkansas.

It is necessary to give the structure of this Petition (Transcript, pages 6 to 20) as the Circuit Court of Appeals held its allegations sufficient to give said District Court in Bankruptcy jurisdiction of the amount of the assessment levied against the Trustee's operating property in Arkansas.

The Petition Alleges

That the Trustee was under order of Court authorized to pay taxes on property of the Debtor for which the Debtor or Trustee was obligated by law to pay; that questions have arisen with respect to the legality and amount of the general taxes assessed and levied for the year 1939 against property of the trust estate then owned and operated by the Trustee; that jurisdiction was given the Bankruptcy Court under Section 64 (a), paragraph 4, of the General Bankruptcy Act of 1938, to determine the question of legality and amount of the taxes. The Petition, however, does not correctly state the terms of said section and paragraph, which relates only to taxes of the bankrupt prior to the bankruptcy proceeding and establishes the priority of such debts when ascertained.

The Petition alleges some of the provisions of the Arkansas Statutes for assessing railroad operating property and the levy and collection of taxes thereupon. In substance, the power and duty of assessment is vested in a State Board designated as the Arkansas Corporation Commission and it is required to consider what a clear fee simple title would sell for under usual conditions of sale of such character of property; and further to consider in so far as other evidence and information in its possession does not make it improper or unjust to do so, the market or actual value of its outstanding capital stock and funded debt and income.

The Petition does not allege, but the Statute, section 2044, Pope's Digest (see Appendix), also requires the Commission to consider the estimated investment and valuation of the property as set up in the Company's books as the basis for adjustment of rates or charges for services, and such other information as to value the Commission may obtain.

The Petition alleges that the value determined by the Commission shall be certified and apportioned to the Counties for the levy and collection of taxes upon such assessed valuation as are levied and collected upon property of local owners.

The Petition alleges the companies are required to make returns of their property and valuation and income, etc., and those were duly made; and that thereafter the Commission is to assess the property.

The Petition alleges that the Trustee was given notice of the impending assessment and that he appeared and protested the tentative amount thereof; and a final hearing was set for December 4, 1939, and after said hearing the final assessment was made of the Trustee's property

in Arkansas in the sum of $28,050,000. That on December 5th, distribution and apportionment was made of the amount to the several counties as required by law and the taxes were levied in such Counties in the amounts set forth in the Petition, and warrants for the collection thereof were in the hands of the local tax collectors at the time the Petition was filed.

The Petition alleged this assessment was based on a System value of $247,565,396; and that there was allocated to Arkansas of it 28.39411 per cent and after said allocation to Arkansas an equalizing factor of 40% was applied thereto, resulting in the aforesaid amount. As neither the allocation factor or equalization factor is assailed, only the System value, further reference to them is unnecessary.

The Petition alleged the System value was arrived at by a composite average of various factors in which 25 per cent consideration was given to the stock and bond values for a five-year period preceding the assessment; 25 per cent consideration to Capitalization of Earnings at the rate of 6% per annum for said period; 25 per cent consideration to Reproduction Cost less depreciation as found by the I. C. C.; 12½ per cent consideration to book value as carried on the books of the Railroad Company, and 12½ per cent consideration to the gross income for the five year period.

The Petition does not assail use of the stock and bond factor and the Capitalization of Earning factor, on the contrary alleges they were proper factors upon which to make the assessment without considering other factors, and that the consideration of those other factors—Reproduction costs less depreciation, book value and gross income—resulted in establishing an over assessment of the Trustee's property which was discriminatory under the Arkansas

Constitution, and in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Petition alleges the use of the proper factors, excluding the alleged improper ones, would have resulted in an assessment of the Trustee's property in the sum of $16,830,000, and sets up an apportionment thereof to the Counties. This table shows the difference in taxes between the assessment made by the Commission and that which the Trustee alleges should have been made, amounts to the sum of $416,043.17. This sum was alleged to be "the amount of taxes in dispute," arising out of the 1939 assessment, and that the taxes based on that assessment now constitute a lien on the property of the Trustee and such lien casts a cloud upon the Trustee's title to said property, the removal of which will be a necessary step in consummation of the Debtor's reorganization. Trans. 6-19.

The Petition failed to allege the Arkansas statutory remedy for a tax payer having such grievance as is set out in this Petition which remedy is found in Sections 2019-2020 of Pope's Digest. See Appendix.

Briefly, it is an appeal from the final Order of the Commission to the Pulaski Circuit Court, a court of general jurisdiction at the seat of government, with provisions for temporary or other proper relief, pending the hearing, and a requirement of advancement to a speedy hearing and further provides for an appeal to the Supreme Court by an aggrieved party with like requirements for advancement upon the docket.

The Supreme Court of Arkansas has held this to be a judicial review of the action of the administrative body.

Clear Creek Oil & Gas Co. v. Spelter Co., 161 Ark. 12.

Instead of pursuing this remedy the Trustee prayed in his Petition that he be authorized to pay the taxes which he sets up therein should be paid, and he withhold and refrain from paying to the collectors the taxes which he disputes, amounting to $416,043.17, until the Court hears and determines the amount and legality thereof. Upon the coming in of the Petition the Court ordered the Trustee to pay the taxes to the collectors according to the amount set up by the Trustee in his Petition, which should be paid, and the Trustee was ordered "to withhold and refrain from paying the collectors of said respective Counties, any additional taxes for the year 1939, based on the assessment heretofore made upon the properties of the Trustee in said State by the Corporation Commission of the State of Arkansas, pending determination by this Court of the amount and legality of the taxes assessed against the property of the Trustee in said respective Counties for the year 1939." Trans. p. 25.

The Petition was set for hearing at a date certain and notice of the same and a copy of the aforesaid order was directed to be sent to the Attorney General of Arkansas, the Corporation Commission of Arkansas, and the Fifty-One County Collectors holding the warrants for the collection of the taxes. Tr. page 21.

Motion to Dissolve and Dismiss

The Attorney General, the Corporation Commission and the Fifty-One Collectors filed a Petition to Dissolve the Injunction and Dismiss the Petition, (Tr. pages 25-34) upon the following grounds:

(1) The assessment was an Order of a Board of the State where reasonable notice was given and full hearing had and where a plain, speedy and efficient remedy was

available to the Petitioner, for the matters and things alleged in said Petition, which remedy was provided in Sections 2019-2020, Pope's Digest.

(2) The assessment made by the Corporation Commission was the basis for a tax imposed by and pursuant to the laws of the State, and taxes accruing in each County as set forth in the Petition were taxes imposed by the laws of the State, and similar allegations were made as to the plain, speedy and efficient remedy provided by the statutes.

(3) The Petition is based on an assumed authority given the District Court in Bankruptcy, under Section 64 (a) (4) of the Bankruptcy Act of 1938, and the Commission alleged said provision establishes priority in debts of a bankrupt estate in liquidation, and if applicable to proceedings under Section 77, is only applicable to taxes due by the bankrupt estate prior to bankruptcy, while the amounts here involved are taxes assessed against the Trustee operating the property. The Commission further alleges that under Chapter IV, Section 23 (b) of the Bankruptcy Act of 1938, the Trustee could only prosecute a suit in a Court where the Bankrupt could have done so had not bankruptcy intervened, assailing the validity of said assessment.

(4) The Commission alleges Section 64 (a) of the Bankruptcy Act was inconsistent with proceedings under Section 77 and is not applicable herein.

(5) The fifth point was not pressed, in the court below and the sixth point now become the fifth, and is that the Petitioner does not present a justiciable controversy. The Petition shows that the alleged method used in making the assessment was purely an administrative question as to the proper weight to be attached to various recognized factors, and not a question for court review.

For each of the aforesaid reasons the Commission prayed that the Injunction be dissolved and also that the Petition be dismissed.

The District Court overruled said Motion, holding it had jurisdiction under 64 (a), notwithstanding the appeal was not taken to the courts in Arkansas, which right was given to the Trustee by the Statutes. Tr. page 39. 33 Fed. Supp. 728. These Petitioners appealed to the Circuit Court of Appeals and it affirmed the decision of the District Court. 116 Fed. (2d) 179.

Explanatory Note:

References to the record are to the transcript as filed in the Circuit Court of Appeals. The final record is in process of printing and we are assured the paging will be the same. The order of argument follows the order of discussion in the opinion of the Circuit Court of Appeals instead of the order set out in the Motion.

POINTS TO BE ARGUED, AND AUTHORITIES

1. Error to follow St. Francis Levee Dist. Cases

AUTHORITIES

St. Francis Levee Dist. v. Kurn, 91 Fed. (2d) 118.
St. Francis Levee Dist. v. Kurn, 98 Fed. (2d) 894.
St. Francis Levee District v. Frisco Railroad, 74 Fed. (2d) 186.
Palmer v. Masachusetts, 308 U. S. 79.
Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573
Nashville & Chattanooga, etc. Railroad v. Browning, 310 U. S. 362.
Thompson v. Terminal Shares, 104 Fed. (2d) 1.
Re: Missouri Pacific RR Co., 33 Fed. Supp. 728.
Section 77, Section 77b and Section 23b, Chapter 4 of the Bankruptcy Act.
Section 60, 57 and 64a.

2. Powers of Bankruptcy Court Exceeded

AUTHORITIES

Palmer v. Massachusetts, 308 U. S. 79.
Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. R. Co., 294 U. S. 648
Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734.
Thompson v. Terminal Shares, 104 Fed. (2d) 1.
McLaughlin v. St. Louis & S. W. Ry., 232 Fed. 579.
Missouri Pacific RR Co. v. Conway & Vilonia Road Dist., 280 Fed. 401.
Massachusetts v. Palmer, 101 Fed. (2d) 48.
Palmer v. Massachusetts, 308 U. S. 605.
Sections 77, and 77b of the Bankruptcy Act.
The Johnson Act of 1934, Title 28, Sec. 41, U. S. C. A.
The Tax Act of 1937, Title 28, Sec. 41, U. S. C. A.

3. Section 64a Is No Part of Section 77

AUTHORITIES

Finletter on Bankruptcy Reorganization, p. 344.
Section 77, Bankruptcy Act, (Title 11, Section 205, U. S. C. A.)
In Re: Brannon, 62 Fed. (2d) 959, (CCA) 5.
Thompson v. The State of Louisiana, 98 Fed. (2d) 108, (CCA 8).
Sections 77, 77b, 57 and 64a of the Bankruptcy Act.

4. Section 64a Not Applicable to Trustees' Taxes

AUTHORITIES

Hennepin County v. M. W. Savage Factories, 83 Fed. (2d) 453.
U. S. C. A., Title 11, Section 104, (64a).

Boteler v. Ingels, 308 U. S. 57.
Act of June 18, 1934, 48 Statutes at Large, page 993.
Thompson v. Louisiana, 98 Fed. (2d) 108.
Haggerty v. Michigan, 286 U. S. 334.
Robertson v. Goree, 29 Fed. (2d) 595.
Macgregor v. Johnson-Cowdin-Emmerich, 39 Fed. 574.
Sections 77, 77b, 57 and 64a of the Bankruptcy Act, Title 28, Section 124, U. S. C. A.

5. Order of April 11, 1940, was an Injunction

AUTHORITIES

Johnson Act of 1934, 41 Statutes at Large, 775 U. S. C. A., Title 28, section 41.
Griesa v. Mutual Life Ins. Co., 165 Fed. 48.
Western Union Telegraph Co. v. U. S. & M. T. Co., 221 Fed. 543.
Enelow v. New York Life Ins. Co., 293 U. S. 379.
Section 24, Judicial Code (U. S. C. A.) Title 28, Section 41.

6. The Trustee Had Adequate Remedy in State Courts

AUTHORITIES

Martineau v. Clear Creek Oil & Gas Co., 141 Ark. 596, Pope's Digest, Section 1936.
Clear Creek Oil & Gas Co., vs. Ft. Smith Spelter Co., 161 Ark. 12.
Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U. S. 231.
Atlas Life Ins. Co. v. Southern, 306 U. S. 561.
Terry v. New York, 104 Fed. (2d) 498.
East Ohio Co. v. Cleveland, 84 Fed. (2d) 443.
McLaughlin v. St. Louis & S. W. Ry. Co., 232 Fed. 579.
Missouri Pacific Ry. Co. v. Conway & Vilonia Road Dist., 280 Fed. 401.

7. The Trustee's Petition Presents Non-justiciable Issue

AUTHORITIES

Public Aids to Transportation, Coordinator's Section of Research, Vol. 2, p. 200.
Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573.
Federal Communication Commission v. Pottsville Broadcasting Co., 309 U. S. 134.
Nashville & Chattanoogo, etc. v. Browning, Adv. Opinion, 310 U. S. 362.
Rowley v. Chi. & N. W. RR., 293 U. S. 102.
Central Ry. v. Martin, 115 Fed. (2d) 968.
The Johnson Act of 1934, USCA, Title 28, section 41.

ARGUMENT

The St. Francis Levee District Cases

The opinion is based primarily on the earlier decisions of that court in the St. Francis Levee District cases, the first of which was St. Francis Levee District v. Kurn, 91 Fed. (2) 118 and the last St. Francis Levee District v. Kurn, 98 Fed. (2) 394. It is of no interest now whether these cases were correctly decided or not. They are not a proper basis for this decision.

The first case was an appeal from an interlocutory injunction granted by the United States District Court for the Eastern District of Arkansas in a suit therein brought by the Trustee against the District which involved foreclosure suits brought by the District against the Trustee. The second was an appeal from an order of the Bankruptcy Court in St. Louis requiring the district to file its claims therein on or before a specified date or be barred and enjoining other foreclosure suits which had been brought since the first suit. These suits did not involve any actions of the State Board nor any taxes imposed by the State or its political subdivisions. The court held in these cases that the District was not a civil or political agency of the State, that it was a mere quasi public corporation like a railroad. There was no statutory remedy for a judicial review of the assessments made by the Board, the only provision was for an administrative review which was discussed fully by the court in St. Francis Levee District v. the Frisco Railroad, 74 Fed. (2), 186.

The District Court in this case followed these cases as binding upon it, and an interesting article reviewing the decision of the District Court is found in the Yale Law Journal of the November 1940 issue, entitled: "Jurisdiction of a Federal Bankruptcy Court to Rule on State Taxes." Furthermore, these cases were decided before this

court rendered its decisions in the cases of Palmer v. Massachusetts, 308 U. S. 79, Railroad Commission v. Rowan and Nichols Oil Company, 310 U. S. 573, and Nashville and Chattanooga, etc., Railroad v. Browning, 310 U. S. 362.

These St. Francis Levee District cases were in effect overruled by a decision of the same court in Thompson v. Terminal Shares, 104 Fed. (2d) 1.

It is interesting to note the sequence of events. That decision was rendered on May 18, 1939. The order made by the District Court in the similar case preceding this one brought in 1939 over the taxes of 1938 shows that the order therein, which was identical with the order in this case, "freezing" 40% of the taxes as assessed and levied, was made on April 12, 1939. Missouri Pacific RR. Co., 33 Fed. Supp. 728. (Tr. p. 35).

Therefore at the time the Trustee prayed for such order and it was granted by the District Court for the Eastern District of Missouri where the proceedings were pending he was advised, and the court was convinced, that its process could run outside of the District and bring in other parties with whom the Trustee had a controversy, to settle their controversy in the Bankruptcy Court.

However, after May 18, 1939, when this decision was delivered this Trustee was pointedly informed by the Court of Appeals:

> "To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the districts of which they are inhabitants."
>
> *Thompson vs. Terminal Shares,* 104 Fed. (2) 1.

Attention is called to the situation presented to the court, which resulted in the above statement. This Trustee of

this railroad filed a suit in the court where the proceedings were pending in the Eastern District of Missouri against eighteen defendants, none of whom were residents of the Eastern District of Missouri. The purpose of the suit was to set aside fraudulent and ultra vires contracts made by the Debtor, and recover a large sum of money from the defendants and impress an equitable lien on property which was not situated in the Eastern District of Missouri.

The defendants were all served without the Eastern District of Missouri and filed a motion to quash the services, which motion was granted by the District Court and affirmed by the Circuit Court of Appeals. The opinion makes a careful analysis of the provisions of section 77 of the Bankruptcy Act and reviews many pertinent authorities construing it, and the companion section 77b provisions.

The court copied in the opinion the old bankruptcy statute which is now brought forward in the 1938 Act, and is now section 23b, Chapter IV, to the effect that suits by a Trustee in Bankruptcy shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, with certain exceptions not pertinent here.

The court applied this section to the controvery then and reached this conclusion:

> "Unquestionably, the claim of the trustee of the Missouri Pacific Railroad Company for an accounting and for the enforcement of the equitable lien asserted is an asset of the trust estate and as such is under the jurisdiction and control of the court of bankruptcy. The property upon which the lien is claimed and the persons of those who possess the property or have claims against it are not within the jurisdiction or un-

der the control of the court of bankruptcy. The power of that court to preserve and safeguard the claim of the trustee does not carry with it the power to adjudicate his controversy with adverse and nonconsenting defendants."

Thompson vs. Terminal Shares, 104 Fed. (2) 1.

It is clear therefore that the court then disapproved the action which had been approved in the last of the St. Francis Levee District cases, where the Levee Board was brought into the court in St. Louis to settle the controversy between it and the Trustee. This case is almost identical in principle with the Terminal Shares case. None of the defendants were served in the Eastern District of Missouri. On the contrary were all served in their official residences in Arkansas, and this petition makes plain that the relief which was sought was in every respect analogous to the relief which this same trustee sought in the Terminal Shares cases.

Here the Petition alleges that it was necessary for the court to determine whether the Trustee's property must bear an excessive and unlawful exaction of $416,043.17, which is the amount of taxes in dispute, and then alleged that the taxes based on said assessment now constitute a lien on the property of the Trustee in Arkansas and such lien casts a cloud upon the Trustee's title to said property, the removal of which will be a necessary step in the consummation of the Debtor's reorganization.

Thus the Trustee sought in this case to resist the claim of a large amount of money, just as in the other case he was seeking to recover a large amount of money, and in this case was seeking to remove a tax lien from his property in Arkansas, as in the other case he was seeking to impress a lien on property without the Eastern District of

Missouri. However the order that is now attacked was made April 11, 1940, almost a year after the Circuit Court of Appeals had taken this positive position in the Terminal Shares case against such order. The error is graver here than in the Terminal Shares case, because here a State Board created by the Constitution and statutes of the State and the Attorney General of the State and fifty-one County Tax Collectors were brought into the court in Missouri to answer a controversy with the Trustee over the amount of taxes due to the State of Arkansas and its counties, and to remove a lien from its real and personal property in Arkansas.

The Circuit Court of Appeals of the Third Circuit recently in Central RR of New Jersey vs. Martin, 115 Fed. (2d) 968, held that a similar proceeding in a federal district court in New Jersey in bringing in the State and County officers and Attorney General of New Jersey over a controverted assessment made pursuant to the statutes of New Jersey was in effect a suit against the State of New Jersey, and not within the jurisdiction of a Federal Court.

Powers of Bankruptcy Court

Palmer v. Massachusetts, 308 U. S. 79, is controlling here. In Massachusetts there is a Department of Public Utilities vested with regulatory power over railroads, including the power to authorize the abandonment of stations.

In Arkansas prior to 1933 there were two regulatory state boards—one the Tax Commission, authorized to assess operating property of railroads, and the other the Railroad Commission with regulatory power over railroads, including the same powers vested in the Massachusetts Department of Public Utilities.

In 1933, the General Assembly abolished the dual board and vested authority theretofore vested in each in the Corporation Commission, this appellant. It is a Constitutional and statutory State Board of equal state dignity as the Department of Public Utilities of Massachusetts.

The New York, New Haven and Hartford Railroad Company filed a petition for reorganization under Section 77 of the Bankruptcy Act and "invoked the shelter of the United States District Court for the District of Connecticut."

This court entertaining jurisdiction operated the railroad through trustees from 1935, and was so operating it in 1937, when the trustees filed a petition with the Department of Public Utilities of Massachusetts to abandon 88 stations in that state.

During the pendency of that Petition the Trustees evidently impressed with the super powers of the Bankruptcy Court abandoned their Petition in Massachusetts and joined with creditors in a Petition to the Bankruptcy Court in Connecticut for the same relief which was prayed in the petition to the Department of Public Utilities in Massachusetts, to-wit, the abandonment of 88 stations. The District Court ruled that Section 77 of the Bankruptcy Act gave it the responsibility of disposing of the petition, and after taking testimony granted it.

The Commonwealth of Massachusetts appealed to the Circuit Court of Appeals and it reversed the District Court. 101 Fed. (2d) 48. The Commonwealth did not dispute the findings of fact by the District Court justifying the abandonment of the stations, and on the other hand the Trustees did not dispute that the order must rest upon some power conferred on the Reorganization Court. Thus the issue was narrowed to whether relief should be sought be-

fore the State Board vested with authority to grant it, or a District Judge sitting in bankruptcy in another state. After stating the arguments of the Trustees to sustain jurisdiction of the Bankruptcy Court the Court of Appeals stated:

"We see no justification for so trenching upon the usual powers of a state while the reorganization remains in substance a receivership, as it does before the plan is confirmed. Of course the judge supersedes the corporate officers and the shareholders, and may, through his trustees, exercise all their powers." * * *

"But we cannot see why, merely because the road may in the end be reorganized, the Judge should be able to dispense with those conditions which the state has imposed upon the grant that alone makes lawful any operation of the road whatever. So to construe the language of subdivisions (c) and (o) is to make him the tribunal to weigh and decide between the conflicting interests of the owners and the public. The notion behind the regulation of public utilities by specially qualified officials is that a judge is not qualified for such duties—at least in the first instance, or until the facts have been sifted and arranged. Assuming that a bankruptcy act might constitutionally go that far, only inescapable language could justify our imputing to Congress the intent to confer so extreme and unnecessarily provocative a power. The powers of trustees in reorganization are, to some degree at any rate, measured by those of receivers in equity (subd. (c) (2), 11 U. S. C. A., Sec. 205 (c) (2), and it has long been the settled policy of Congress to subject receivers in their management of the properties in their custody to the laws of the states, section 124 Title 28, U. S. Code, 28 U. S. C. A., sec 124."

Mass. vs. Palmer, 101 Fed. (2) 48.

The case then came to this court and the decision of the Circuit Court of Appeals was affirmed, and these excerpts from the opinion are equally applicable to this case as to the Massachusetts case:

> "In view of the judicial history of railroad receiverships and the extent to which section 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the goverance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a complete plan of reorganization for an insolvent road." • • •
>
> "But, in any event, against possible inconveniences due to observance of state law we must balance the feelings of local communities, the dislocation of their habits and the over-riding of expert state agencies by a single judge sitting, as in this case, in another state, removed from familiarity with local problems, and not necessarily gifted with statesmanlike imagination that transcends the wisdom of local attachments."

Palmer vs. Mass. 308 U. S. 79.

In Note 17 to the case, the court referred to Re Tyler, 149 U. S. 164, and other decisions of this Court cited by the Trustees and stated that they dealt with attempts at "physical invasion" of the property held in the custody of a Federal Court. Then it stated:

> "Section 65 of the Judicial Code (March 3, 1911) 36 Stat. at L. 1104, chap. 231, 28 USCA, sec. 124) decisively indicates that Congress did not intend that

those who operate a business under the control of a federal court should be immune from the regulatory authority of the several states any more than they are from their taxing power."

Palmer vs. Mass. supra, n. 17.

It is interesting to note that a summary of the authorities cited by the Trustees included the St. Francis Levee District cases herein discussed. This court had the benefit of those cases when it rendered this decision, which as we view it is entirely contrary to the doctrines announced in said cases.

Had the Corporation Commission in this case been dealing with one of its other powers, that is, the regulation of railroad services within the state, then this case would have rendered proceedings in bankruptcy to the same end futile, and the interpretive note referred to shows the minds of the court ran to state control of taxation, as well as state regulation of railroads.

In Continental Illinois N. B. & T. Co. v. C. R. I. & P. R. Co., 294 U. S. 648, the court pointed out that under Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 739, it was necessary in order to give full sweep to the bankruptcy powers over assets of estates in bankruptcy outside of the district of the bankruptcy proceeding, to have ancillary proceedings in the district where the property was located.

Therefore when Congress provided for railroad reorganization in bankruptcy this provision for process running without the District became necessary, as thus explained by the court:

"Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a single state, but in numerous instances reach into

many districts and many states. The lines of the Rock Island system extend into 20 districts and 14 states. Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a single district court. The usefulness of the section would be greatly minimized and in some instances destroyed if that court were powerless to send its process into any state when necessary to effectuate the purposes of the law."

Continental Pet. Co. vs. C. R. I. & P. R. Co., 294 U. S. 648.

When the Massachusetts case was before the Circuit Court of Appeals the Trustees argued that in order to effect reorganization the Bankruptcy Court must be immune from local interference. The court said they might feel some force in this argument if the court had found it would defeat any plan of reorganization to be devised to let these stations continue, but indicated that until it was proved that the particular thing would defeat the plan of reorganization, the bankruptcy power could not be invoked and stated: "Mere pendency of the reorganization does not affect pre-existing powers."

Mass. vs. Palmer, 101 Fed. (2) 48.

The Circuit Court of Appeals of the Eighth Circuit in Thompson v. Terminal Shares, 104 Fed. (2d) 1, in discussing this provision of the Bankruptcy Act, said:

"Since Section 77 as amended in 1935 and Section 77B are identical with respect to the jurisdiction of the bankruptcy courts, except that under Section 77 the courts are expressly given the power to send process outside their districts, it is apparent that if jurisdiction of this suit exists as claimed by the appellant, it must be because of the process provision of

Section 77. To our minds that provision is more procedural than jurisdictional. We think it was intended to make certain that the bankruptcy court had the means for making the jurisdiction otherwise conferred upon it, with respect to the property in its custody, effective beyond the limits of the district."

The court in the opinion here cites as sustaining the power of the Bankruptcy Court the following: The St. Francis Levee District cases (91 Fed. (2) 118, 98 Fed. (2) 394); Ex Parte Baldwin, 291 U. S. 618; Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734; Henderson County v. Wilkins, 43 Fed. (2) 670 and New York v. Irving, 288 U. S. 229.

Ex Parte Baldwin restates the principles announced in Isaacs v. Hobbs Tie & Timber Company of exclusiveness of the jurisdiction of the Bankruptcy Court of the custody and possession of the bankrupt property wherever situated and to protect its jurisdiction. The Court stated: "Such power is not peculiar to bankruptcy or to Federal Courts." *Ex Parte Baldwin, supra,* 618. It stated that the jurisdiction to protect its possession may issue either from the court of original jurisdiction or the Federal Court of the District where the property is situated, but it is to be noted that the powers therein referred to are all for protection of possession.

It further held that Section 23b of the Bankruptcy Act (forbidding suits by trustees other than where the bankrupt could have brought them) only relates to suits where the trustee was plaintiff and had no restrictive effect on the right of the trustee or receiver to protect his possession.

"There is not the semblance of protection of the possession of the property in the Petition which is now under review. On the other hand the controversy in the Baldwin case was over a suit brought in the State Court asserting title in fee

to a part of an interurban road which was in possession of the trustees. The court held that the trustees could restrain such suit but did not sustain them in their effort for a mandamus—which was the form of this suit, because the Trustee had a common remedy by injunction which could be granted by the Bankruptcy Court unless in its discretion it concluded the litigation should proceed in the State Court.

There is nothing in this case to sustain the opinion of the Court of Appeals; on the contrary the analysis of the Bankruptcy powers demonstrates that the Bankruptcy Court has not the power which it assumed in this case. There is no element herein affecting the custody of the Debtor's property.

The Court plainly stated that injunction was the common remedy to protect the possession of the bankrupt estate and necessarily their possession was not involved—all state laws and other Acts of Congress were in full force.

Isaacs v. Hobbs Tie & Timber Company was a landmark in bankruptcy jurisprudence. It stated the exclusive jurisdiction of the bankruptcy court over the assets of the bankrupt, no matter where they were situated and pointed out the remedy by ancillary proceedings and by injunction to sustain the jurisdiction of the court over the estate in its hands.

The Henderson County case was decided in 1930 before the Johnson Act of 1934 or the Tax Act of 1937 were enacted, and it did not fall within the inhibition of section 23b of the Bankruptcy Act, and of course no question of reorganization entered therein. It was ordinary bankruptcy of a hotel corporation and the claim for taxes did not arise from any action of a State Board from whose order an appeal would give a judicial review thereof. The facts were

briefly these: The hotel property was listed by its owner at a valuation of $250,000 in 1926 and the company went into bankruptcy in 1927, and the hotel was then incomplete. Finally it was sold in bankruptcy for $110,000. After the owner assessed the property in 1926 no further returns were made and in default thereof the taxing officers carried forward the old assessment and taxes were based thereupon, and the Trustee protested the amount thereof and an issue of fact was raised and determined first before the Referee and then before the Court and the value was fixed at $110,000.

There was much discussion of the power of the Bankruptcy Court in such cases, but as no issue here raised was there raised, the discussion is academic.

The Irving Trust Company case was one of ordinary bankruptcy where the State of New York filed claim for taxes due it from the bankrupt prior to bankruptcy. Such a claim properly fell within Section 64a (4) of the Bankruptcy Act. The Court made an order barring all claims which were not filed within a given date. The New York tax claim was not filed within that date and the sole question was whether such order was valid against the State.

It was held that to properly administer bankrupt estates the allowance of claims, reduction of the estate to money and its distribution, and the determination of preferred claims, in priorities were confided to the Bankruptcy court; and if the state desired to participate in the distribution of the estate it must comply with the orders of the Court.

Certainly this case does not support the power of the bankruptcy court to bring the officers of another state before it to determine the validity of the action of the State Board where a speedy and efficient remedy was afforded under the laws of the state for any complaint against the

assessment. In fact it merely sustained the right of the Bankruptcy Court to issue an order barring all claims which were not filed within the designated time; and it has no bearing here; other than the statement of the purposes of ordinary bankruptcy proceedings, and the effect of Section 64a therein, which shows the utter inconsistency of making said section a part of the proceeding under Section 77 of the Bankruptcy Act.

The Circuit Court of Appeals of the Eighth Circuit has applied a sound principle to tax cases arising in Arkansas which deprived any other court than the one provided by statute with jurisdiction to hear them. It is thus stated in the syllabus in Missouri Pacific R. C. v. Conway and Vilonia Road Dist., 280 Fed. 401:

> "A provision of Road Laws Ark. 1919 vol. 1, p. 387, sec. 5, for an appeal by a landowner, deeming himself aggrieved by the assessment of his lands, to the chancery court, with right of appeal to the Supreme Court, provides an exclusive method for review of assessments for a highway, so that suits in equity attacking the assessment must be dismissed."

To the same effect see McLaughlin v. St. Louis & S. W. Ry., 232 Fed. 579.

Section 64a Is Inconsistent and Not Part of Section 77.

The court decided that Section 64a of the general Bankruptcy Act is applicable to proceedings under Section 77 thereof. Subdivision 1 of Section 77 provides that in all proceedings under it and consistent with its provisions, the jurisdiction and powers of the court etc., shall be the same as if a voluntary petition and adjudication had been had.

Finletter on Bankruptcy Reorganization, page 344, states:

> "Section 77 makes no direct reference to Section 64, providing merely that "in proceedings under this section and consistent with the provisions thereof" the rights of creditors shall be the same as if a voluntary petition for adjudication had been filed and a decree entered thereon. This provision is sufficient, it is believed, to exclude Section 64 from application to proceedings under Section 77, for the scheme of Section 64 is inconsistent with the Railroad Act. The priorities which Section 64 establishes are those designed for ordinary bankruptcy, that is for a proceeding affecting unsecured debts only. They are not intended or appropriate for a proceeding which disturbs secured debts as well, and it was for this reason that Section 64 was excluded from application under Chapter X. Any reorganization proceeding which deals with secured debts must have a hierarchy of priorities which will put certain classes (such as administrative expenses) ahead of the secured creditors, and Section 64 does not do so. It provides only for the "debts to have priority, in advance of the payment of dividends to (unsecured) creditors." Further there appears in Section 64 itself, by its references to arrangements and wage-earners' plans and its failure to refer to plans of reorganization (the term which would have been used had it been intended to refer to Section 77) an intention that its provisions shall not apply under the Railroad Act."

A review of some of the pertinent provisions of Section 77 (Title 11, Section 205, U. S. C. A.) shows the soundness of the above statement. The Judge shall require the Trustee to prepare and file with the Court in lieu of schedules

as required in general bankruptcy, a list of bondholders and creditors, amount and character of the debts, securities etc., and a list of all stockholders. (c) (4). The Judge shall fix a reasonable time within which claims of creditors may be filed or evidenced and after which time no claim not filed or so evidenced may participate in the proceedings with an exception stated. Then after notice and hearing a division is made by the Court of creditors and stockholders into classes according to the nature of their respective claims and interests. "Such division shall not provide for separate classification unless there be substantial differences in priorities, claims and interests." (c) (7). Under the general act Section 57 prescribes a method of proof of claims, while Section 77 leaves to the judge the methods of requiring their evidence, and Section 57 further provides details for the allowance of claims, secured and unsecured. The proceedings under Section 77 is merely to ascertain the amount and classifications of claims in order to determine who may participate in the reorganization plan and vote thereupon.

Section 60 of the General Act provides for preferred creditors and their rights, which cannot be pertinent in reorganization proceedings for the plan of reorganization covers that field.

Thereafter comes Section 64 dealing with debts which have priority in advance of dividends and establishing the order of their priorities.

The Circuit Court of Appeals of the Fifth Circuit in In Re Brannon, 62 Fed. (2d) 959, said: "Section 64 gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and incumbrances have been dealt with," citing many cases.

Section 77 does not contemplate the payment of debts at all, except as payments may be provided in the plan of reorganization in which their priorities are determined by the plan, to be approved by the Interstate Commerce Commission and by the stockholders and creditors and confirmed by the Court.

The payment of debts as in ordinary bankruptcy is foreign to reorganization proceedings. Reorganization does not contemplate a sale by the court of any of the debtor's property for the purpose of paying the *bankrupt's debts*, but on the contrary contemplates continuance of the corporation, and the Trustee holds the title to the property for the sole purpose of rehabilitation. Thompson v. The State of Louisiana, 98 Fed. (2d) 108, (CCA 8).

The cardinal purpose of Section 77 is to prevent a sale of the debtor's property and its continued operation, while the ultimate end of all bankruptcy proceedings is the sale and disposal of all the property of the debtor and the payment of debts so far as may be realized from such sales.

Section 64a is only intended to apply to proceedings where liquidation is contemplated. Liquidation can never occur under section 77. A plan of Reorginization is approved or the proceeding is dismissed. Under 77b, now Chapter X if a plan fails, the Court may order liquidation. No such power exists in the court under Section 77.

Section 64a Not Applicable to Trustees' Taxes.

There have been several minor changes in Section 64, which is the section of the Bankruptcy Act establishing which debts have priority, but in its final form as now existing, so far as applicable here, reads as follows:

"(a) The debts to have priority, in advance of the

payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition. * * *

"(4) Taxes legally due and owing by the bankrupt to the United States or any States or any subdivision thereof. * * *

"And provided further, that, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

The opinion holds the words "any taxes" used in paragraph 4 is not restricted to the bankrupt's taxes, but is applicable to the trustees's taxes also.

It is submitted that such construction is contrary to the text. The only class of taxes where express authority is given to the Bankruptcy Court to hear and determine them are those within the fourth priority. That class consists of taxes legally due and owing by the bankrupt to the United States or any States or subdivisions thereof.

Thus the United States placed its own taxes against the bankrupt in the fourth class priority and the states' as well.

There were good reasons therefor. These are taxes of a wreck, while the trustees' taxes are to salvage a wreck.

Subdivision (J) of Section 57 of the Bankruptcy Act prohibits the allowance of tax penalties or forfeitures accruing in favor of the United States or a State against a bankrupt estate.

It was held in Boteler v. Ingels, 308 U. S. 57, that when the tax penalty accrued against the bankrupt it could not be

collected, but those accruing against the trustee were collectible from the Bankrupt estate, and the difference between the taxes of a trustee and a bankrupt is therein pointed out.

For these and other causes it was reasonable to assume that there would be a contest over taxes of the bankrupt estates, whether they included penalties, or what-not, and in order that the estates might be promptly administered to the end that distribution be made, the Bankruptcy Court was given jurisdiction to hear and settle those issues. The text confines this power to the bankrupt "taxes due to the state or the government." The law is so written and it should be so enforced. The taxes of the trustee are on a wholly different basis, and if Section 64a is applicable at all, they would be in the first priority as part of the expenses of preserving the property.

However, they need no classification and there is no need to invoke 64a to class them as administrative expenses.

The Circuit Court of Appeals of the Eighth Circuit in Thompson vs. State of Louisiana, 98 Fed. (2d) 108, held that the franchise taxes of Louisiana, against the trustee of the Missouri Pacific Railway Company were administrative expenses.

The court quoted from the opinion of Mr. Justice Cardozo speaking for this court in Haggerty v. Michigan, 286 U. S. 334, which case was dealing with an equity receivership. In part the quotation was as follows:

> "Viewing the receivership in its true light as one, not to wind up the corporation, but to foster the assets, we think the annual taxes accruing while the receiver was in charge must be deemed expenses of ad-

ministration and therefore charges to be satisfied in preference to the claims of general creditors."

Thompson vs. State of Louisiana, 98 Fed. (2) 108.

Thus the principle prevailing in equity receivership was accepted by the Court of Appeals as applicable to the Trustee of the Missouri Pacific Railway Company and he was compelled to pay as administrative as expenses, franchise taxes of Louisiana and Arkansas.

The Court pointed to Title 28, Section 124, USCA, making a trustee in bankruptcy operating a business under order of a Federal Court subject to all state and local taxes applicable to such business as if conducted by an individual or corporation, as fortifying its conclusion.

Furthermore the court said that when the Debtor filed its petition for Reorganizatoon under Section 77 of the Bankruptcy Act it not only invoked all applicable provisions of the Act, but "subjected itself to all obligations which the Act might invoke." Thus the Trustee has assumed the obligation to pay such taxes as his Debtor had to pay and has assumed to stand in the shoes of his Debtor when he seeks to bring a suit to protect his real or imagined grievances, and to bring it only where his debtor could have brought it. However, this is not the first time said court has held that a Trustee's taxes were administrative expenses and not controlled by section 64a.

In Hennepin County v. M. W. Savage Factories, 83 Fed. (2d) 453, a case originating under Section 77b and converted into a general bankruptcy proceeding it said:

> " 'The amendment of section 64a of the Bankruptcy Act (11 U. S. C. A. Sec. 104)—assuming that the law is relevant to the case at bar—does not touch the payment of taxes accruing during the trustee's possession'."

That opinion, after reviewing decisions of two other Circuit Courts of Appeal, to the effect that 64a was not applicable to trustee's taxes in reorganization proceedings said:

> "That seems to be a reasonable and sensible interpretation, since such taxes are not in a true sense taxes 'due and owing by the bankrupt,' but are ordinary carrying charges of property taken over and used by the trustees under order of the court in the conduct of their own operations and for the benefit of general creditors."

Under the decision here, taxes which are operating expenses are no longer in a class of operating expenses, but deferred to the fourth priority, a construction that would materially affect operation of properties in reorganization proceedings.

The Circuit Court of Appeals of the Fifth Circuit in Robertson v. Goree, 29 Fed. (2d) 361 and the Second Circuit in MacGregor v. Johnson Cowdin-Emmerich, 39 Fed. (2d) 574, each held the Trustee's taxes were administrative expenses and were not taxes of the bankrupt and were not within the 4th paragraph.

The Order of April 11, 1940, Was an Injunction.

The court in the opinion here declares that the order referred to was not an injunction within the meaning of the Johnson Act of 1934, (U. S. C. A. Title 28, Section 41.) It was the duty of the trustee to pay these taxes because they were duly levied and assessed, and without such order these taxes would have been paid by him. This order arrested the payment of 40% of the taxes assessed and levied in the hands of the collectors for collection amounting to $416,043.17. The property being in the hands of the Bank-

ruptcy Court prevented the Collectors proceeding under the statutes to collect these taxes as they would have been required to have done under the law had not this order been issued. This order directed the Trustee to hold in his hand said amount and effectually operated as an injunction against the collectors proceeding under the statute until the court in bankruptcy in St. Louis heard and determined the amount and validity of the taxes.

This was an exercise of equity jurisdiction operating in personam, requiring the trustee to do or refrain from doing the particular thing. Where a stay of proceeding is ordered or effectuated, it makes no difference whether the matter is pending in the same court or a different court or stopping a statutory proceeding. The essential element is an exercise of the equitable principle. The use of the words "refrain or enjoin" are not necessary words. It is the effect of the order, not its language which is to be considered.

Justice Van DeVanter, then Circuit Judge, speaking for the Circuit Court of Appeals of the Eighth Circuit, in Griesa v. Mutual Life Insurance Company, 165 Fed. 48, said:

> "As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is, Did it grant an injunction? To us the answer does not seem doubtful. A court of equity possessed no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein, and this is so well recognized that when, in a court of equity, a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised, although the technical terms "restrain and enjoin" be not used. Plainly the insurance company intended to seek, and the Circuit Court intended to grant, in the

suit in equity, an order staying proceedings in the action at law, and the record furnishes no reason for believing that either intended that the order should be other than an authorized exertion of the injunctive power."

Later, through Judge Walter H. Sanborn, this same court approved and applied Justice Van DeVanter's opinion. Western Union Telegraph Co. v. U. S. & M. T. Co., 221 Fed. 543. This court has applied the same principle in Enelow v. New York Life Ins. Co., 292 U. S. 379.

In Gainsburg v. Dodge, 193 Ark. 473, the Court quoted approvingly:

"A writ of injunction may be defined as a judicial process, operating in personam, and requiring the person to whom it is directed to do or refrain from doing a particular thing."

The court answered the petitioner's contentions that this order was a violation of the tax statute of 1937, now a part of 24 Judicial Code (U. S. C. A. Title 28, Sec. 41) in the same way, namely, that this was not an injunction and, hence, it was immaterial that a plain, speedy and efficient remedy was provided by the statutes of the State for a judicial review in the courts of the State of the matters complained of in regard to the assessment.

Adequate Remedy for the Alleged Grievances Provided in the State Law.

The opinion of the Circuit Court of Appeals stated that it was immaterial to consider whether there was a remedy for the Petitioner and his alleged grievances in the State courts. We assume this was on the theory that the Order of April 11, 1940, was not an injunction and therefore the

Johnson Act of 1934 and the Tax of 1937 were inapplicable.

We have elsewhere discussed the injunctive effect of that order. As we view it, it is material to see the rights provided by the laws of Arkansas to the Trustee for his grievances as alleged in his Petition. As heretofore stated, prior to 1933 Arkansas had two State Boards with jurisdiction over railroads—one the Tax Commission with duties of assessing taxes of public utilities and the other the Railroad Commission with the duties of regulating railroads.

Appeals from the action of the Railroad Commission were provided by the statute, but no appeal was provided from orders of the Tax Commission. However, the Supreme Court had worked out relief in equity for non-appealable orders of the Tax Commission when a taxpayer had such rights as alleged the Petitioner has in this case. Martineau vs. Clear Creek Oil & Gas Co., 141 Ark. 596.

This is not material now other than to demonstrate that Arkansas has always furnished an adequate remedy to taxpayers from any unconstitutional or arbitrary invasion of their rights.

In 1933 the Legislature abolished the Tax Commission and the Railroad Commission and created the Arkansas Corporation Commission and vested the sole body with all the jurisdiction and duties of the two preceding bodies.

Section 9 of the Act of 1933—now Pope's Digest, section 1936, reads: "Appeals may be taken from the action of the Commission in the manner and within the time and to the court now prescribed by law for appeals from the Railroad Commission."

The exact nature of this review was before the Supreme

Court in Clear Creek Oil & Gas Co. v. Spelter Co., 161 Ark. 12.

"Therefore the presumption is that the rates fixed by the Commission are reasonable, and the burden of proof is upon the company contesting the rates to show to the contrary. Our statute contemplates a judicial review of the Circuit Court of the law and the facts as presented to the Commission, and it is the duty of the Circuit Court to try the questions of law and fact upon the same record as the Commission, bearing in mind that the Commission is a rate-making body created by the Legislature, and its orders are prima facie correct, and that this presumption in their favor will yield only to the probative force of the evidence in the record. It is not the duty of the court to establish the rates, but to determine whether the rates as established by the Commission, when considered in the light of the evidence, are reasonable.

Upon appeal to this court we are called upon to inquire into the weight of the evidence for the purpose of determining whether or not the judgment of the Circuit Court is against the preponderance of the evidence."

This case was carried by writ of error to this court and it affirmed the decision of the Supreme Court of Arkansas.

Fort Smith Spelter Company v. Clear Creek Oil & Gas Co., 267 U. S. 231. This case was decided by the Supreme Court of Arkansas November 5th, 1923—ten years before the Legislature abolished the Tax Commission and vested its powers in the Corporation Commission, and granted a right of appeal from orders of that Commission to the Court. Therefore, when the Legislature granted this right of appeal to the court, it did so with full knowledge that it granted a judicial review from all orders of the Corporation Commission.

The statutory procedure is copied in the Appendix. Attention is called to these features of it:

First: It provides that the appeal shall be given preference over all other cases on the docket in the Circuit Court, and in the Supreme Court shall be treated as involving public interest and advanced and given preference on the docket.

Second: It gives express authority to the Circuit Judge when the appeal is lodged in the Circuit Court to issue temporary or preliminary orders as he may deem proper until the decree is rendered.

Thus the execution of adverse orders may be stayed and the Supreme Court has the inherent right to do so when the case reaches that court on appeal.

Thus a speedy review is assured and judicial authority to protect all needed rights pending the litigation; and the decisions of the Supreme Court of Arkansas are subject to review in this court, as in the Spelter Company case. It is immaterial whether the remedy in the State courts is in equity or at law.

In Atlas Life Ins. Co. v. Southern, 306 U. S. 561, one of the questions was whether the adequate remedy at law which would preclude a court of equity from granting relief must be one available in Federal Court. The Court said:

"By long-settled construction, the accepted test of legal adequacy which the section prescribes is the legal remedy which the federal, rather than state, courts afford," citing cases.

"But although the adequacy of the legal remedy precludes resort to a federal court of equity, it does not follow that the converse is true—that the want of a legal remedy

in the federal courts gives the suitor free entrance to a federal court of equity." Further the court said:

"It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a federal court, and in that case there is no threat of irreparable injury. See Cable v. U. S. L. Ins. Co. 191 U. S. 288. On comparable grounds a federal court may withhold its aid when a plaintiff has failed to resort to a state administrative remedy."

The Circuit Court of Appeals of the Eighth Circuit in Terry v. New York Life Ins. Co., 104 Fed. (2d) 498, had before it a similar question, and said:

"The mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial," citing many cases, and quoting from Atlas Insurance Co. case just referred to.

The Sixth Circuit Court of Appeals in East Ohio Co. v. City of Cleveland 84 Fed. (2d) 443, held that the Johnson Act applied when the state court afforded a remedy, in that case in equity, for the matters complained of in a federal suit.

We have heretofore called attention to two decisions of the Circuit Court of Appeals of the Eighth Circuit, that where the State affords a remedy for the alleged grievances of the taxpayer, the remedy is exclusive, and for convenience, repeat the citations:

McLaughlin v. St. Louis & S W Ry., 232 Fed. 579;

Missouri Pacific RR Co. v. Conway and Vilonia Road Dist., 280 Fed. 401.

Non-Justiciable Issue

This opinion summarizes the allegations of the Petition as to the issue presented therein which have been set forth in the Statement. The Petitioners' contention is that giving full sweep to the allegation of the wrongful method of making the assessment of the system value, yet it does not present a justiciable issue for review in a State or Federal Court. Each factor alleged to have been used by the Commission is a factor commonly employed by courts and commissions in establishing value.

These various factors which were referred to in various decisions are considered in a Government Publication entitled: "Public Aids to Transportation" which was written by Charles S. Morgan, Director, Coordinator's Section of Research, in which there is found this statement in volume 2, at page 200:

> "The different state assessing bodies use different methods of valuation. Few, if any, State boards confine themselves to only one formula for valuation, the great majority using combinations of two or more. The better known formulas are so-called physical valuation, cost of reproduction new less depreciation, original cost, book value, gross receipts, market value of stocks and bonds, and capitalization of net income."

Then the author proceeds to show weakness in each of the factors, particularly if used alone, and concludes the discussion as follows:

> "These criticisms are essentially sound, but they can be overcome in large measure by a valuation method which employs a combination of two or more formulae. Further, the operation of valuation methods is not confined to the bare outlines mentioned, but in some instances involves consideration of average income, stock

and bond prices, or physical valuations over a period of years. Irregularities are thus to some extent ironed out."

It is thoroughly settled by this court that evidentiary weight is a matter solely for the administrative board and is not a subject of judicial review.

In Rowley v. Chicago & N. W. R. Co., 293 U. S. 102, the Court said:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value —of the property," citing many cases.

The last word directly on the subject is Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573.

To safeguard its oil resources Texas devised a regulatory scheme for their proration and placed its administration in the Railroad Commission's hands.

In conformity with procedural provisions of the statute, the Commission issued a Proration Order concerning East Texas oil fields. Each well was allowed to produce 2.32% of its hourly potential, and its practical operations cut across by allowances to marginal wells which limited application of the rule of the daily allowables to one-third of the total for the class in which the Respondent's wells fell.

For years much effort had been made by the Commission to work out proper factors for proration, and also for the

involved situation of rights growing out of marginal wells. The court said:

> "State agencies have encountered innumerable difficulties in trying to adjust the many conflicting interests which grow out of the rule of capture and its implications."
>
> *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573.

The case abounded in expert testimony on the one side to support other formulas and factors to achieve perfect proration and on the other side to support the formula and factors adopted as reasonably applicable to accomplish a fair result.

"These touch matters of geography, geology, physics and engineering," the court said:

> "But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment."
>
> *Railroad Commission vs. Rowan & Nichols Oil Co.*, 310 U. S. 573.

The Petition here renders an issue that a formula allegedly used by the Commission consists of a composite of five factors, each of them well known valuation factors for ascertaining value; and that this was wrong in that only two of these factors should be used.

Experts in economics, taxation, valuation, markets and railroad operations are invited by such allegations, and such allegations can only be sustained or refuted by potent experts if this issue is to be tried out in the court.

The controlling principle is thus stated:

"Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

The Court concluded the discussion as follows:

"It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

Railroad Commission vs. Rowan & Nichols Oil Co.,
310 U. S. 573.

In Federal Communications Commission v. Pottsville Broadcasting Co. 308 U. S. 605, there was a question of relationship of the judiciary to an administrative board, in this instance a Federal Administrative Board, but the principle is necessarily applicable to a State Board, especially in view of the Johnson Act of 1934, giving orders of State Boards Federal safe-guards. The Court said:

"A review by a federal court of the action of a lower court is only one phase of a single unified process. But

to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued.

"The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of 'judicial power' conferred by Congress under the Constitution.

• • •

"But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, or the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine."

Fed. Communication Com. vs. Pottsville Broadcasting Co., 308 U. S. 605.

Nashville, Chattanooga, etc. Ry. v. Browning, 310 U. S. 362, supports the principles herein sought to be applied.

In Central R. Co. of New Jersey v. Martin, 115 Fed. (2d) 968, the Third Circuit Court of Appeals, had before it allegations quite similar to those in the Petition here, but the

Court held that they were untenable and did not present issues for judicial review. In substance, the court holds that under the Browning case the Court could not sustain the bill under the Due Process Clause and that it was violation of the state laws; it ruled that this was not a matter for consideration in the Federal Court, as it did not amount to an arbitrary denial of the Due Process of law, and stated:

> "Certainly it would not be beyond the legislative power of the state to prescribe such bases for the valuation of railroad property as a class."

We have heretofore referred to and attach in the Appendix the Arkansas statute requiring the Corporation Commission to give consideration to the very factors of which complaint is here made.

Therefore, it is submitted the Petition on its face presents only a question of the relation of recognized evidentiary factors, and these are exclusively questions for the state board to give to them such weight as in their considerate judgment should be given thereto.

Respectfully submitted,

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APPENDIX

Statutory rule for assessing property by the Corporation Commission. Pope's Digest of the Statutes of Arkansas, sec. 2044:

"The valuation of the property of all persons, firms, companies, co-partnerships, associations and corporations required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be the Commission, insofar as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain."

Appeal from the Corporation Commission to the Court—Pope's Digest, sections 2019 and 2020:

2019: "Appeal from Arkansas Corporation Commission to Pulaski Circuit Court, within thirty days after the entry on the record of the said Arkansas Corporation Commission of any order made by it, any party aggrieved may file a written motion with any member of such commission or with the secretary thereof praying for appeal from such order to the Circuit Court of Pulaski County; and thereupon said appeal shall be automatically deemed as granted as a matter of right without any further order. The secretary of said Commission shall then at once make full and

complete transcript of all proceedings had before such Commission in such matter and of all evidence before it in such matter, including all files therein, and deposit same forthwith in the office of the clerk of said Circuit Court, which appeal shall be given preference over all other cases on the docket of said circuit court.

Upon the filing of the aforesaid motion of said appeal and at any time thereafter the said circuit court or its Circuit Judge shall have the right to issue such temporary or preliminary orders as to it or him may seem proper until final decree is rendered. * * *

Section 2020: "Appeal to the Supreme Court, within thirty days after rendition of any order of any Circuit Court under the terms of this act, whether such order be rendered on appeal of municipal council or city commission action or Arkansas Corporation Commission action, any party aggrieved may file a motion in writing in said Circuit Court or in the office of the clerk thereof, praying an appeal from such order to the Supreme Court of Arkansas, which motion when so filed shall be granted as a matter of right by the said Circuit Court or by the clerk thereof; and in such case, the appeal to the Supreme Court shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such Circuit Court, except that any finding of fact by the Circuit Court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable.

The record shall be lodged in the office of the clerk of the Supreme Court within sixty days from the rendition of the order in the Circuit Court, and all such cases shall be regarded and treated in the Supreme Court as cases involving public interest and shall be advanced and given preference on the docket of said court on motion of either party."